

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 27**

WAL-MART STORES, INC.,¹

Employer,

Case 27-RC-8356

and

UNITED FOOD AND COMMERCIAL
WORKERS UNION, LOCAL NO. 7,

Petitioner,

DECISION AND DIRECTION OF ELECTION

On November 16, 2004, the Petitioner, United Food and Commercial Workers Union, Local No. 7, filed a petition under Section 9(c) of the National Labor Relations Act seeking to represent certain employees of Wal-Mart, Stores, Inc. On December 2, 3, 7, 8, 9, 10, and 13, 2004, a hearing was held before Hearing Officer Michael T. Pennington. Following the close of the hearing, the parties timely filed briefs.

The issues to be resolved in this case relate to the appropriate scope of the petitioned-for unit and the supervisory status of one individual. The Petitioner seeks to represent approximately 20 employees in the tire and lube express division (TLE Division 6) at Store 953, located at 1325 North Denver Avenue, Loveland, Colorado. TLE Division 6 consists of Department 10 - automotive sales and Department 37 - tire, lube and express service. The Employer contends that because of the similarity in

¹ The petition listed the Employer as "Wal-Mart, Inc." Counsel for the Employer in its post-hearing brief and Board Exhibit 1(d) name the Employer as "Wal-Mart Stores, Inc." This was also found to be the correct legal name of the Employer in two Board decisions and four Regional Director's decisions referred to herein. Accordingly, I shall correct what appears to be an inadvertent error and find the correct legal name of the Employer to be Wal-Mart Stores, Inc.

terms and conditions of employment and interaction of all store employees in the performance of their job functions, the petitioned-for unit is not appropriate and that the only appropriate unit must be a wall-to-wall unit including approximately 480 hourly Store 953 employees. Contrary to the Petitioner, the Employer further contends that “department manager” Marjorie “Anita” Evans² possesses and exercises Section 2(11) supervisory indicia and should be excluded from the unit.³ Anita Evans is department manager of Department 10 - automotive sales. There is no history of collective bargaining for any of the employees at issue herein.

For the reasons enunciated below, I conclude that the petitioned-for unit is appropriate, and I shall direct an election in that unit. I also find that the Employer has failed to meet its burden of demonstrating that Anita Evans is a statutory supervisor, and I shall include her in the unit.

Under Section 3(b) of the Act, the Board has delegated its authority in this proceeding to me. Upon the entire record in this proceeding, I find:

1. The hearing officer’s rulings made at the hearing are free from prejudicial error and are hereby affirmed.
2. The parties stipulated, and I find, that the Employer is engaged in commerce within the meaning of section 2(6) and (7) of the Act and that it is subject to the

² Evans is referred to in the record and exhibits interchangeably as “Marjorie Evans” and “Anita Evans.” Apparently, she prefers to be called Anita, but her given name is Marjorie which she generally uses to sign documents.

³ The Employer expressly declined to present evidence or take a position regarding the supervisory status of about 20 other individuals classified by the Employer as department managers who are in positions similar to Anita Evans, notwithstanding its contention that the only appropriate unit is a wall-to-wall unit. The Employer also has employees in positions it calls “support manager” and “service manager.” The parties stipulated that Department 37 “service manager” Rob Freidah and “support manager” Ed Horn are not statutory supervisors and should be included in any unit found appropriate herein. It is unclear whether there are any other service or support managers in Store 963.

jurisdiction of the Board. Specifically, I find that the Employer is a Delaware corporation with offices and retail stores throughout the United States, including Store 953, located at 1325 North Denver Avenue, Loveland Colorado, which is the only store at issue herein. In the course and conduct of its business operations at Store 953, the Employer derived gross revenues valued in excess of \$500,000 and purchased and received at its Loveland store goods and materials valued in excess of \$5,000 directly from suppliers located outside the State of Colorado.

3. The parties stipulated, and I find, that Petitioner is a labor organization within the meaning of Section 2(5) of the Act.

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act, and it will effectuate the purposes of the Act to assert jurisdiction herein.

5. It is appropriate to direct an election in the following unit of employees:

INCLUDED: All fulltime and regular parttime employees employed by the Employer in its TLE Division 6 (Department 10-Automotive Sales and Department 37-Tire and Lube Express) at the Employer's Store 953 located at 1325 North Denver Avenue, Loveland Colorado, including service technicians, service writer/greeters, service managers, support managers, overnight stockers, sales associates and automotive department managers.

EXCLUDED: All guards and supervisors as defined by the Act, and all other employees.

STATEMENT OF THE CASE

A. Background

Store 953 relocated to its current location in April 2002. Prior to that, it was located at 3133 North Garfield, Loveland, Colorado. At its former location, Store 953 was called a “Division 1” store which sold primarily general merchandise. At its new location, Store 953 is classified as a “supercenter,” which included the addition of a supermarket and the automotive sales and TLE departments at issue herein. This supercenter is housed in a 205,000 square feet building and consists of 13 separate divisions, which, in turn, are divided into various departments. This divisional structure was established by the Employer’s corporate headquarters in Bentonville, Arkansas, where much of the control over all store operations is centralized. In this regard, the policies and procedures addressed below, including almost all of the forms used to implement such policies and procedures, are devised by corporate headquarters. Corporate headquarters also establishes the departmental layout for the stores; determines the product lines to be carried and advertised, and sets pricing guidelines, which can be deviated from by a store manager only in limited circumstances.

Notwithstanding the above-noted centralization, individual store managers are vested with significant autonomy in determining how much statutory supervisory authority they will vest in the salaried managers and hourly department managers reporting to them. In this regard, four other Regional Directors have issued decisions and directions of elections finding units identical to that sought by the Petitioner herein to be appropriate. In those four cases the Employer has taken varying positions

regarding the supervisory status of Department 10 managers and Department 37 service managers and support managers.⁴

B. TLE Division 6 location and layout

The automotive sales department is located at the rear of the store sales area on the southeastern side. Behind the main store sales area are the receiving area, management offices, training room, and employee-only areas such as the breakroom, locker area, and hallway where schedules and announcements to employees are posted. The store was described in the record as a big square box with a jut-out that comprises the automotive sales area. Further out from that, are the eight tire and lube service bays, which are accessible to employees and customers through a locked security door. The automotive sales and service cash register counter is adjacent to the secured door to the service bays. Behind the cash register counter is another secured area, which consists of a storage room, employee-only bathroom, and the TLE district manager's office. That bathroom can be used by all store employees, not just TLE and automotive sales employees. There is also a secured storage area that is accessible only through the TLE service bays for storage of tires and bulk oil. Because of safety concerns, the service bays are considered a restricted area. There is an actual

⁴ In Case 6-RC-11844 (New Castle, PA), the Employer took the position that the Department 10 manager and Department 37 service managers were statutory supervisors. The Regional Director found that they were not.

In Case 28-RC-5889, (Kingman, AZ), the Employer argued that the Department 10 manager and Department 37 service manager and support manager were not statutory supervisors. In that same case, the Employer also urged that a wall-to-wall unit was appropriate, but took the alternate position that any unit including Department 37 employees must also include Department 10 employees.

In Case 21-RC-20301 (Elsinore, CA), the Employer took the position that the Department 10 manager was a statutory supervisor. The Regional Director found that he was not.

Finally, In Case 33-RC-4636 (Dubuque, IA), the parties stipulated that the Department 10 manager and Department 37 service manager and support manager were not statutory supervisors.

customer entrance directly into the automotive sales area for access by customers who use the parking lot adjacent to TLE or the drive up lane check-in option for tire, lube, and oil work. As discussed below, that drive up lane is staffed by the greeter/service writer who uses a palm pilot for electronic transmission of customer service orders. Customers can also place the same service orders in the automotive sales area and generally do so when they need to select tires, batteries or special oil specific to their vehicle performance needs. There is a waiting area for customers who elect not to shop in the main store while their cars are being serviced. The sporting goods department is adjacent to the automotive sales area on the inside of the store. Employees working the cash register counter in sporting goods have a direct line of sight to the cash register counter in automotive sales.

C. Store operations

While Store 983 is open 24-hours a day, seven-days a week, certain departments close at night and other departments may remain open, but are not specifically staffed. In this regard, the sporting goods and electronics department remain staffed through the night because of theft potential. There are also night stockers in various departments, including automotive sales, and cashiers working at the main checkout area through the night.

The TLE service bays are open from 7:00 a.m. to 8:00 p.m., Monday through Saturday, and 8:00 a.m. to 6:00 p.m. on Sundays. The automotive sales area is open, and the cash register/service counter is staffed every day from 7:00 a.m. to 10:00 or 11:00 p.m., depending on the season. After those hours, the shelf products are available for sale, but automotive employees are not available to assist customers.

These staffed hours are similar to those of other departments, such as the pharmacy, vision center, bakery, seafood counter, the paint-mixing center in hardware, and the photo center. During times when these areas are not specifically staffed, assistant managers can assist customers with purchases. For instance, assistant managers will cut keys for customers in the automotive sales area or mix paint in hardware when these areas are not specifically staffed.

D. Management hierarchy

John Murray is the store manager, and he oversees all of the divisions of the supercenter. He has overall responsibility for the profit and loss of the store, as well as personnel matters, including decisions relating to hiring, coaching, and terminations. Murray also has overall responsibility for merchandising, sales, and cashier operations. Murray reports to Sandy Ellison, a district manager.

Reporting to Murray are two salaried co-managers, Karisa Porter (general merchandise) and Aaron Shipp (grocery); and fourteen salaried assistant managers.⁵ These fourteen assistant managers are responsible for specific divisions of the supercenter, which the Employer calls “stores within a store” (referred to by the Employer as “S.W.A.S.”). The Employer utilizes the same divisional structure throughout the United States at its supercenters.⁶ These “stores within a store” divisions include various divisions. For example, Division 1-General Merchandise encompasses departments for softlines and front-end (clothing, cashier and checkout operations), hardlines (sporting goods, hardware, electronics), and homelines (small

⁵ While the record does not specifically contain a stipulation to the Section 2(11) supervisory status of all the salaried managers, the record supports a finding that they have and exercise the authority to hire, fire, and discipline employees, and I shall exclude them from the unit on that basis.

⁶ Store Manager Murray testified that he has the authority to deviate from this structure if it would serve the needs of his supercenter, but he has not done so.

appliances, dish sets, towels, home décor). The other divisions at Store 953 are: TLE Division 6-Automotive; Division 10-Pharmacy; Division 11-Jewelry; Division 15-Shoes; Division 24-Meat/Deli; Division 25-Produce; Division 26-Frozen Dairy; Division 27-Bakery; Division 28-Grocery, Division 30-Vision Center, Division 31-Photo, and Division 45-Connection Center (cellular phone services).

The assistant manager of TLE Division 6 is Murray “Chip” Madeen.⁷ Madeen runs the TLE Division 6 automotive operations. TLE Division 6 consists of the two departments in the petitioned-for unit: Department 10 automotive sales (currently 4 employees and Evans) and Department 37, automotive service (currently 15 employees). Another of the 14 assistant managers, Susan Just, also has limited merchandizing oversight of TLE Division 6, but her primary responsibilities are for Division 1, Department 5, home entertainment; Department 9, sporting goods; Department 44, piece goods; and Department 19, fabric and crafts. There is no evidence that Just directs the work of TLE Division 6 employees or engages in other supervision of those employees.

Some of the Store 953 divisions also have a district manager to whom the assistant managers report for matters primarily relating to merchandising and product lines. Automotive sales and TLE report to such a district manager. Larry Edisen has very recently replaced Brain Bennett as TLE district manager. While Bennett’s home office was located at the Greeley, Colorado store and it is unclear how much time he spent in Store 953, Edisen has elected to have his home office at Store 953, so he has

⁷ While Madeen has only held this position at Store 953 for about three weeks, he had held the same position at two other stores (Store 5341, Broomfield, Colorado and Store 514, Aiken, South Carolina) for about seven years. Prior to Madeen, the TLE assistant manager was Michael Jordan. Madeen and his predecessor, Jordan, are among the 14 salaried assistant managers I have found to be statutory supervisors.

been in the automotive department almost every day since he took over as district manager. Edisen oversees a total of six stores.

The other Store 953 divisions which report to district managers include the shoe and jewelry divisions which report to a single district manager. The pharmacy division, vision services division, photo lab and Division 1-general merchandise each report to a district manager for their respective divisions. The record reflects that all of these district managers, including the TLE division manager, are not involved in day-to-day personnel matters, but rather are involved in merchandising and product line decisions relating to the season, climate, and nature of the community in which the stores are situated. These district managers report to regional managers or regional vice presidents.

Management meetings are held Monday through Friday at 9:00 a.m. for all salaried managers, including TLE assistant manager Chip Madeen. Those in attendance discuss staffing needs, merchandising, weather, and whatever other issues are raised by the managers. These discussions may include an assistant manager seeking authorization for overtime because of unexpected departmental needs, such as illness or injury to an employee. Anita Evans, automotive sales department manager, does not attend these meetings, even if Madeen is absent. According to store manager Murray, Evans does, however, attend a weekly hourly department manager meeting. Evans did not testify about these meetings and the record contains scant details about who besides Evans attends these meetings or the precise purpose of these meetings. According to the store manager, these meetings are primarily used to impart information about merchandizing to department managers and may also be used review Employer

policies and procedures and train those in attendance on aspects of their jobs, including their function in the applicant interviewing process and evaluation process.

Nonmandatory hourly-employee meetings are held three times a day in various departments. Generally 40-50 employees attend the morning meeting, and 20-25 employees attend the afternoon meeting. The record does not disclose how many employees attend the evening meeting, nor does it disclose how often or how many TLE Division 6 employees attend these hourly-paid employee meetings. These meetings are run by salaried managers and include discussions of store sales figures, store functions, upcoming events or holidays, and acknowledgement of exemplary employee performance or employee anniversary dates.

E. Benefits and working conditions

Each store, including Store 953, has its own personnel department which centralizes all matters relating to hiring, payroll, and disciplinary decisions for the store. Thus, the store manager has the ultimate authority in hiring or discipline for all Store 953 employees. The two co-managers possess the same authority, if store manager Murray is absent. Applicants interested in applying for a position at Store 953 fill out a computerized application on two kiosks in the store designated for that purpose. The applications are reviewed by the personnel manager who selects and schedules the interview of applicants for open positions. The initial interview is with the personnel manager and the hourly-paid department supervisor for the department for which the applicant has been called in. In the case of any department without an hourly-paid supervisor, lead associates participate in that process. After the initial interview, the hourly-paid department supervisor or lead associate and the personnel manager

discuss the applicant and a second interview is arranged with a salaried assistant manager if the applicant is deemed a good candidate for the store. The assistant manager who conducts the second interview ultimately determines whether the applicant will be presented to the store manager who makes the actual hiring determination. Evans' specific role in the interview process will be discussed below.

Once applicants have been hired, they attend a joint orientation session, which includes reviewing and completing applicable legal documents such as I-9 and tax related forms, and a general introduction to Wal-Mart's "culture" and policies. All employees are subject to Wal-Mart work rules and apprised of any changes in these rules. New-hires are also given their name badge and first schedule at this orientation, and they begin the process of training for their specific job position. Each employee must complete "CBL" (computer based learning) modules specific to the position for which they have been hired before actually beginning work. Some employees also must complete on-the-job training under the supervision of a salaried manager or designated hourly-paid employee and receive written certification before they can perform unsupervised job functions. This will be discussed in greater detail below, as it relates to the TLE Division 6 employees at issue herein.

During the initial orientation, the new-hires also receive the Employer's 170-page benefit handbook that outlines all of the benefits available to all hourly-paid Wal-Mart employees, including those in TLE Division 6. These benefits include: bereavement, holiday, sick, vacation and personal leave pay; accidental death and dismemberment, medical, dental, and life insurance; bonus, profit-sharing, and 401(k) plans; and

discounts for Wal-Mart purchases, Sam's Club memberships, and AT&T long-distance telephone services.

The Employer has a progressive discipline policy, which starts with an oral warning. The verbal warnings (called coachings) are not written down and signed by the employee, but are entered into the computer system by the salaried manager administering the oral warning as part of the progressive disciplinary system. The computer entry notes what the coaching was for, who gave the coaching, and who the witnesses were. Written warnings and suspension (which the Employer refers to as decision-making days) require the employee to actually key their password into the system and acknowledge that they received the discipline. The salaried manager issuing the discipline enters his password into the system at the time the discipline is meted out as do the other managerial witnesses.

The assistant managers have the authority to coach, discipline, and discharge employees, but only after receiving approval from the store manager or co-managers. The assistant managers actually investigate incidents that may lead to discipline, determine what level of discipline is warranted, and issue the discipline once they report their findings and receive the authorization from the store manager. The store manager does not conduct an independent investigation unless he actually happens to have been involved in the underlying incident, such as the case of a customer complaining directly to him. In those instances, the store manager will still involve the assistant manager as a witness and may instruct the assistant manager to mete out the discipline. The record does not establish that department managers such as Evans possess any disciplinary authority.

Weekly scheduling is done by the various assistant managers on a department-by-department basis utilizing the computer system on one of the sixteen "Smart Terminals" located in or near the communal manager's office in Store 953. The actual schedules are written into the computer system by the assistant managers after they receive their allotted labor-hour numbers from the store manager. The store manager calculates those labor-hour numbers based on projected sales, last year's sales and staffing data, up-coming holidays, and intangible variables like weather conditions or community events. Generally the amount set for labor costs is 12-13 percent of sales. After writing the schedule, each assistant manager submits the schedule via computer to the co-managers who review all the schedules and compare them with the store manager's authorized labor hours. The co-managers then print a report and submit it to the store manager for review. Murray reviews the schedules and either approves them or makes changes as he sees fit. After final approval, the schedules are printed out and posted by the personnel department in the locked cases in the back hallway. Murray testified that he makes changes to the automotive/TLE schedule an average of once a month before approving it. The TLE Division 6 schedule is written by Madeen and there is no evidence that Evans has any involvement in this process.

The store manager, or co-managers in his absence, are the only individuals with authority to authorize overtime for hourly employees. Overtime needs are generally discussed at the daily salaried manager meetings and the assistant managers receive overtime authorization from the store manager at these meetings. The store manager or co-managers may also authorize overtime on an emergency basis such as if an employee calls in sick and overtime by another employee is needed to staff a vital area.

There are about four storewide barbeques held each year, which are open to employees and their families. There are also an annual Halloween party and a Christmas party, which are also open to all store employees and their families.

Employees receive performance evaluations after their first 90-days of service and then annually thereafter unless they are under a performance plan relating to poor performance. The store's personnel manager determines when employees are eligible for 90-day and annual evaluations and downloads the form specific to the employee's job position to begin the process. The payroll manager places the form in a rack assigned to the applicable assistant manager. In the case of TLE, the rack is assigned to Madeen. The assistant manager retrieves the form and fills it out, seeking input from applicable hourly department managers, such as Evans. Once the evaluation has been completed, it is returned to the personnel manager who inputs data into the payroll system to activate any wage increases relating to the evaluation. The record establishes that the annual evaluations are tied to wage increases as discussed below. The evaluation forms require the assistant manager to check performance in various categories, ranking the employee as either exceeding, meeting, or below expectations. The various checkmarks are then tallied and the employee receives an overall ranking in one of those same three categories. An overall ranking of "exceeds expectations" translates to a 55-cent per hour raise at the annual evaluation. An overall ranking of "meets expectations" translates to 40-cent per hour raise at the annual evaluation. An overall ranking of "below expectations" means the employee receives no raise at the annual evaluation, but is entitled to a re-evaluation within six months. Employees receiving below expectation rankings are also placed on performance improvement

plans. The evidence establishes that Anita Evans and other hourly department managers have some involvement in this evaluation process. Evans' involvement will be discussed in further detail below.

Employees also can be eligible for 50-cent per hour merit increase for "stellar performance." An assistant manager who believes an employee should receive a merit increase fills out a form and submits it to the store manager for authorization. If the store manager agrees, he must submit it to the district manager over Store 953 for approval. There is no evidence that hourly-paid department managers like Evans have authority to recommend employees for merit increases due to "stellar performance."

Entry-level hourly wages for employees in Store 953 range from \$7.00 (front end employees) to \$11.25 (pharmacy/prescriptions). Maximum hourly wages range from \$7.80 (domestic goods) to \$21.43 (back office employees). The wage ranges for Department 10, automotive sales associates and night stockers, are from \$7.80 to \$9.56. Anita Evans' rate is \$11.20 per hour. The wage ranges for Department 37, TLE service, are from \$8.20 to \$11.55.

All Store 953 employees are also eligible annually for a "stakeholder" bonus. These bonuses are given in March or April following the end of the Employer's fiscal year January 30 of each year. They are based on store profitability and are given to all employees who were on the payroll as of the previous August. The most recent such bonuses were in the range of \$600 to \$700.

All Store 953 employees must enter and exit through the front store entrance and clock-in in the back hallway. That hallway also contains lockers that all employees can use if they wish. Lockers are assigned by the personnel manager during orientation

or at any time an employee seeks access to a locker. All employees also use one breakroom, which includes a smoking section, although some of the TLE Division 6 employees take their breaks in the automotive sales stockroom instead.

All store employees are also eligible to apply for open positions in the store, including promotions. The open positions are posted in the store. Any employee interested in a transfer expresses his interest to the assistant manager for that department. Employees are then interviewed by the assistant manager and store manager. After the interview, the employee/applicants are usually discussed at the daily salaried manager meetings and a consensus is reached as to whom the best candidate is. All promotion decisions must be approved by the store manager, notwithstanding the consensus reached at the daily managers' meeting. A similar process is followed when an employee wants to transfer from one store division to another. Transfers must be signed off on by a salaried member of management.

All employees wear identical name badges except that employees under age 18 have a yellow dot on their name badge so that salaried managers can ensure that applicable child labor laws are followed as they pertain to employees under age 18. Most employees in the store wear the Employer's trademark blue vest, but there are uniforms provided and cleaned by the Employer for certain departments such as meat, bakery, and the TLE service employees. Some store employees, such as those in the vision center and photo lab, wear smocks instead of vests.

F. TLE Division 6 facts

TLE Division 6 assistant manager Chip Madeen has overall responsibility for the TLE service departments and automotive sales. Madeen reports to the store manager

on all personnel related issues and to the TLE district manager on all merchandising and product line issues.

All merchandise for TLE Division 6 is received through the general merchandise receiving area either from Wal-Mart trucks or direct freight delivery by outside suppliers. Generally, automotive sales department merchandise comes in after 4:00 p.m., at which time it is palletized by the receiving employees. Around 9:00 p.m., the pallets are moved to the various departments, including automotive, where the merchandise is stocked by the automotive department night stocker. Some of the TLE merchandise, such as bulk oil and tires, is delivered at varying times during the day by suppliers. These items are checked in by receiving and then delivered directly to TLE storage areas where they are verified and stocked by the TLE technicians, rather than awaiting stocking by the night stockers.

TLE Division 6 employees have two cash registers and a separate computer terminal for writing up service orders. These are located in the automotive sales area. The service technicians also have computer terminals in the service bays for accessing service orders. These service orders are input either by the service writer/greeter or by TLE Division 6 employees using the terminal in the automotive sales area. While TLE Division 6 employees can ring up non-automotive purchases, and cashiers in the front end can ring up automotive service invoices, there is no evidence in the record that any employees other than TLE Division 6 employees can actually write service orders.

Department 37-TLE

Service writer/greeter:

There is currently one employee in this position, Alicia Sylvia. Sylvia greets customers that walk through the TLE parking lot and offers to assist them with automotive service. She operates a Palm Pilot to take service orders from customers and electronically transmits orders to the computer system in the TLE work bays. The service writer/greeter also vacuums out cars, check lights on vehicles to see if any bulbs need changing, checks windshield wiper blades to see if they are functioning properly, and washes the car windows. The service writer/greeter wears the same uniform as the service technician consisting of blue uniform pants and shirt.

Service technicians:

The 12 service technicians are certified by the Employer to perform oil changes, replace faulty wiper blades or air filters, replace vehicle batteries, change and balance tires, and check fluid volumes and top them off as needed. In this regard, the service technicians perform the function sought by the customer such as an oil change or tire replacement, but also check for other possible problems. If the technician determines that the air filter or wiper blades are bad, or light bulbs are out, they page the customer to have them return to the automotive sales area and alert the customer to the potential problem to see if the customer wants it fixed also. The service technicians are also responsible for stocking their supply shelves, receiving and verifying tire and bulk oil deliveries, and sweeping and cleaning their work bays. This includes cleaning up oil spills and emptying garbage cans. The service technicians wear blue uniform shirts and pants which are provided and cleaned by the Employer. They also wear protective

eyewear, and hard helmets or hardhats when working in the bays. When handling batteries, they wear rubber gloves, rubber aprons, and goggles. These safety items are worn to fulfill OSHA safety requirements.

With regard to the work the service technicians perform, they use various types of equipment unique to their work functions, including tire breakers, tire jacks, car lifts, wheel balancers, air compressors and air tools. They also use standard hand tools such as pliers and wrenches. The Employer does not require the service technicians to have prior experience, but they must be trained on the Employer's CBL modules for all aspects of their jobs and then be certified by the Employer to perform each specific type of service offered by the Employer in the TLE service department. This certification involves performing each type of service offered by the Employer six times to the satisfaction of a trainer, after which the employee receives written certification and is allowed to perform that service unsupervised. The certifications are posted in the service bay area. The service technicians also take a computerized test from the Michelin tire company and receive written certification after passing the tests.

TLE support manager:

Ed Horne is the TLE support manager. The parties stipulated that he is not a statutory supervisor and the record supports that stipulation. Horne generally works in the automotive sales area at the automotive service computer terminal. He writes service orders, assists customers with product purchases, particularly tire sales for installation by TLE employees. Horn also assists with stocking shelves and ringing up customer purchases.

TLE service manager:

Bob Freidah is currently the TLE service manager. The parties stipulated that he does not possess or exercise any statutory supervisory indicia and the record supports that stipulation. Friedah spends the majority of his time performing the same functions as the service technicians, but he has the added responsibility of performing the on-the-job training of technicians once they have passed their CBL training modules. Friedah also shadows the service technicians as they perform service on six vehicles for each type of service offered in TLE before he certifies them to work on their own.

Department 10-Automotive Sales

Department 10 manager:

Anita Evans was promoted to Department 10 manager on January 3, 2004. Evans works Monday through Friday, 7:00 a.m. to 4:00 p.m. There are currently four other employees in Department 10, two night stockers and two sales associates. Evans is responsible for the overall condition of the sales floor and back storage room in the automotive sales department. She starts her workday by walking through the department and stock room with Chip Madeen to assess whether there is anything the night stockers failed to get done and determine what new displays should be built or features need to be switched out. Together, Madeen and Evans formulate a prioritized list which Evans gives to the sales associates so they can work on those tasks when they are not busy with customers. The tasks on this list might include switching out features or end cap displays, restocking shelves, organizing the stock room and moving products out of the stock room to make room for incoming orders. With regard to assigning the work on the daily list, Evans stated that if she had two employees present

on one shift, she asks which one wants to work the counter and which one wants to help her on the floor. She may also have the person who wants to work the counter do some restocking tasks close to the counter. Evans spends a considerable percentage of her time stocking items and changing out features in the automotive sales department. She also is responsible for setting up featured automotive product displays in other parts of the store, but must have the approval of co-manager Karisa Porter to do so. On Mondays, Evans is responsible for going to competitor's stores to check competitor's prices on automotive sales department items. If she determines that a competitor has a lower price on a given item, she meets with the store manager or a co-manager in his absence to seek approval to lower the price on that item. Similarly, Evans may seek approval to raise the price on an item based on competitors' prices. She then is responsible for inputting the changed prices into the computer system and changing the shelf signage. In theory, Evans is responsible for overseeing both TLE and automotive sales on Wednesdays when TLE assistant manager Chip Madeen is scheduled to be off; however, because Madeen is so new to the store, he has been working most Wednesdays.

During the morning walk-through, Evans also assesses whether there are any missing products. If Evans determines that there are, she uses the Employer's handheld "Telexon" device to check whether the missing product is in the automotive storage room, main receiving backroom, or already on order. If the product is not in the store or on order, Evans orders the missing product. Evans is normally responsible for placing merchandise orders for the automotive sales department. Such orders are placed on a daily basis. This is accomplished by inputting UPC numbers and amounts for needed

merchandise into the “Telexon” device. These orders are electronically transmitted to the UPC office in the store. The UPC clerk prints out a hard copy of the order and reviews it for obvious errors. The UPC clerk has an available salaried assistant manager review all the orders, including those for TLE. The responding assistant manager looks for miskeys or products missed. That manager may call Evans to verify unusual items or amounts. Once the assistant manager approves the order, it is given back to the UPC clerk with the okay to finalize the order. The orders are then electronically transmitted to the Employer’s Bentonville, Arkansas headquarters where they are routed to the various Wal-Mart warehouses and vendors.

Another duty assigned to Evans is to go to customer service, if paged, to pick up automotive department returns for restocking; core batteries for disposal; and to check that products such as car stereo systems being returned have all the parts before the return transaction is completed by the customer service counter employees. Similarly, Evans is responsible for taking products that have been recalled or are damaged or have missing parts to the claims employees, who in turn process them for reimbursement to the Employer. The two sales associates perform these identical duties if Evans is not available.

Evans does participate in the interview process outlined above, but the record evidence indicates that ultimate authority for hiring rests with the store manager. In that regard, Evans is only involved at the preliminary screening stages of the hiring process with the personnel manager after the personnel manager has selected potential applicants. Evans and the personnel manager fill out a pre-interview form after asking the applicant the questions on the form. After the interview is concluded, the personnel

manager and Evans consult and then check yes or no at the end of the form, noting whether or not they recommend the applicant for a “salaried management interview.” A salaried manager, which in the case of a TLE applicant is Madeen, must conduct the second interview. On occasion, the store manager will conduct yet a third interview. The assistant manager recommends the applicant for hire to the store manager who must approve all hiring decisions. The store manager is not involved if an assistant manager decides the applicant should not be hired. There is no evidence regarding how often Evans has been involved this initial interview process, although the Employer did enter one interview form into evidence which was signed by Evans. There is no evidence regarding whether Evans, in consultation with the personnel manager, has ever checked the “no” box on the form which serves to end the application process.

With regard to the employee evaluation process, the Employer entered five performance appraisals into evidence which were signed by Evans on the line for “Hourly Supervisor Signature.” These appraisals also are required to be signed by the employee being appraised, a salaried manager or designated management trainee, and the store manager. Of the five appraisals entered into the record, four were for 90-day appraisals which do not appear to result in wage increases for the employees.⁸ The fifth appraisal was actually filled out by someone in a store from which that employee had recently transferred and was just signed by Evans and salaried managers in Store 953. With regard to two of the four appraisals in which Evans actually participated, Evans testified that she gave input to then-TLE assistant manager Michael Jordan, who

⁸ In this regard, while there was significant discussion regarding both 90-day and annual appraisals, none of the witnesses testified regarding whether employees receive raises based on the 90-day appraisals. The Employer’s brief supports a conclusion that raises are only give in conjunction with the annual appraisals. Specifically, the Employer’s brief at page 35 states: “Employee raises are tied to the annual performance appraisals. [Emphasis added.]”

actually filled out the forms and gave the appraisal to the employee. On another 90-day appraisal, Evans actually wrote up the appraisal form, which was then reviewed and supplemented by Jordan. It appears that Evans along with Jordan then met with the employee to give him the details of the appraisal. On the remaining appraisal, Jordan was unavailable, so Evans filled out the form and met to discuss it and have it approved by Division 1 assistant manager Susan Just before giving it to the employee.

If an employee is late for work, the computer system does not allow them to clock in by swiping their badge. They must get the store manager or an assistant manager to manually enter them into the system. Evans does not have the authority to manually enter employees into the timeclock system. If employees simply forget to clock in, however, they fill out a time adjustment request form and have Evans sign it. The employee then takes that form to personnel to ensure that it gets entered into the system. According to Evans, she is just affirming that the employee was physically present in the store at the time stated on the form by the employee. This same time adjustment form is used by employees for vacation requests and other forms of leave. The Store manager testified that the signature on most of these time adjustment forms is after the time off has already occurred, not an approval for future time off. If the request is for vacation time, the employee simply fills out the form, has Evans sign it and takes it to personnel which inputs that data into the computer system. When the assistant manager prepares to write the schedule, that vacation time is already in the computer schedule template for that week. There is no evidence that Evans actually is approving the vacation request when she signs the form in these circumstances.

The record also establishes that employees calling in sick or with a personal emergency normally ask to speak to the manager in charge of the store, not Evans. Evans testified that if an employee asks her for time off or to change their work schedule, she sends them to Madeen if he is available. If Madeen is not available, she checks the schedule to see if the scheduled TLE employees can cover the absence. There is no evidence of how often such requests occur when Madeen is not available or of whether Evans has ever authorized a schedule change or denied a time off request.

Department 10 Sales Associates:

There are two sales associates assigned to Department 10, automotive sales. The sales associates primarily ring up customer purchases from the automotive sales and service area as well as other store merchandise, make keys, and offer customer assistance as needed for the sale of automobile stereos or other automotive products. These two employees, along with Evans and Horn, the TLE support manager, are responsible for writing up service work orders for oil changes, tires, and batteries and the automotive services associated with such sales. The record establishes that one of the sales associates' major functions is to cut keys for customers as approximately 100 keys are cut each day in Store 953. The two sales associates are assigned to staggered shifts to cover the automotive department service counter and to ensure that cash registers are staffed. In this regard, the Employer accommodates the college schedule of sales associate Cody Fields who currently works Tuesday, Thursday, and Sunday, noon to 9:00 p.m., and Wednesday from 5:00 p.m. to 9:00 p.m. Ryan Sann was identified as the other automotive sales associate, but not called to testify. It is not clear what his work schedule is. These sales associates, like most of the other store

employees do not wear a uniform, but wear the Employer's trademark blue vest and name badge.

Night Stockers:

There are two Division 6 TLE employees classified by the Employer as night stockers in Store 953. They are each scheduled to work four 10-hour shifts per week, starting at 10:00 p.m. They overlap one night per week, but the other nights, each works alone. The freight for automotive sales and TLE is brought to the department by the freight crew on pallets. The night stockers break down the pallets of merchandise and stock it on the shelves, endcaps, and other display modules or put the stock into the TLE storage room. They also look for the notes formulated by Madeen and Evans about any new displays they are to stock, or if they are to move stock to a new locations because of seasonal changes in stock or because certain items are going to be featured. Such notes are left about every other night. Sometimes in lieu of notes, they leave oral instructions with the evening sales associate when that employee's shift overlaps with the night stockers. After the night stockers have stocked all the merchandise, they break down the boxes, putting the cardboard and packing debris into shopping carts. The empty pallets and shopping carts of cardboard and other trash are removed from the department by employees from another department assigned to perform that function for all departments. Those employees take it back to the receiving area to be compacted or baled.

G. Interchange, interaction, and permanent transfers

Among the Employer's bases for asserting that the only appropriate unit herein is a wall-to-wall unit are the functional integration of the store operations and employee

interchange, interaction and a high number of permanent transfers into and out of TLE Division 6. The facts involving these bases follows.

Employee interchange

As noted, some of the TLE Division 6 employees perform work similar to employees in other divisions and departments in the store, including stocking shelves, customer service, and operating cash registers. Nonetheless, because many of the tasks performed by TLE Division 6 employees require Employer-certified training before an employee is authorized to perform these tasks, only employees from within TLE Division 6 are given these assignments. A nominal exception to the Employer's policy of not temporarily transferring employees into TLE Division 6 is that sporting goods department employees and salaried managers occasionally cut keys for customers when TLE Division 6 employees are unavailable. The record is replete with testimony from salaried managers and hourly-paid employees that when help is needed in either TLE or automotive sales, that help is obtained from within TLE Division 6. Specifically, if help is needed in automotive sales because of an employee absence, service technicians fill in. Similarly, if help is needed in TLE service, several of the automotive sales employees, including Evans, are trained and certified in at least some functions in the service bays such as oil changes, and it is the automotive sales employees who fill in as needed. TLE support manager Horn also may be pulled from the automotive sales area to work in the service bays as a service technician, if needed. Finally, rather than assigning employees from other departments in the store, the Employer will authorize overtime for off duty service technicians, or in rare instances, bring in certified

TLE employees from other stores. There is no evidence of temporary transfers between TLE Division 6 and other areas of the store.

Employee Interaction

The record is clear that there is interaction between the TLE Division 6 employees and other employees in the store. The Employer's policies including its "ten-foot rule" require employees in any department to assist a customer in finding products in another department which can involve interaction between employees from various departments.⁹ Customer service managers also are required to perform cash pick-ups or assist in cash register over-rings in the automotive sales department; and receiving employees interact with TLE Division 6 employees when products arrive or when the TLE Division 6 employees take trash to the compactor. TLE Division 6 employees also interact with employees at the customer service counter regarding merchandise and battery core returns. All of the salaried managers also interact with the TLE Division 6 employees in various ways including when employees use the "open door" policy by requesting to speak with a particular manager, call in sick, or when a salaried manager is investigating a customer complaint.

Permanent transfers

The record establishes that there have been over 30 permanent transfers in and out of TLE Division 6 since the store opened. Approximately 14 of these transfers occurred in 2002. In 2003, there were five employees who transferred from other store departments into TLE Division 6 positions, and three who transferred out of TLE

⁹ The ten foot rule mandates that any employee who comes within ten feet of a customer is to look the customer in the eye, greet the customer, smile, and ask if they can be of assistance. If the customer wants help, the employee is supposed to take the customer to the product no matter where it is located in the store.

Division 6 into other store positions. In 2004, there were six employees who transferred from other store departments into TLE Division 6 positions and two TLE Division 6 employees who transferred out of TLE positions into other departments. As noted, any store employee can apply for open positions within the store or request transfers to other stores. These transfers are approved by the store manager. When employees transfer into positions in TLE Division 6, they are required to complete any CBL training modules and certifications applicable to their new job position. There is no record evidence that after a permanent transfer occurs, the transferred employee is ever utilized to fill in for absent employees in the department from which the employee transferred.

CONCLUSIONS AND FINDINGS

A. Supervisory status of Anita Evans

I turn first to the issue of whether Department 10-automotive sales manager Anita Evans is a statutory supervisor as contended by the Employer.

Supervisory analysis legal framework

Section 2(11) of the Act defines a supervisor as:

Any individual having authority, in the interest of the employer, to hire, transfer, suspend, layoff, recall, promote, discharge, assign, reward, or discipline employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

This section is read in the disjunctive, and an individual need only possess one of the enumerated authorities to render that individual a supervisor. See, **KGW-TV**, 329 NLRB 378 (1999); **Providence Hospital**, 320 NLRB 717 (1996). The requirement of

use of independent judgment, however, is conjunctive. An individual is not a supervisor unless the individual exercises an authority with the use of independent judgment and holds the authority in the interest of the employer. **KGW-TV**, Id. Thus, an individual possessing Section 2(11) supervisory indicia must exercise authority in a manner that is not merely routine or clerical in nature. Only individuals with genuine management prerogatives are to be considered supervisors, as opposed to lead men and other minor supervisory employees. **Panaro & Grimes, d/b/a Azusa Ranch Market**, 321 NLRB 811 (1996). As stated by the Board recently in **Wal-Mart, Stores, Inc.**, 340 NLRB No. 31 (2003): “Because the Act excludes any “supervisor” of the employer from that definition of “employee” entitled to the Act’s protections, the Board has a duty not to construe supervisory status too broadly.” Finally, in the matter now under consideration the burden is on the Employer, as the party alleging supervisory status, to prove that Evans is a statutory supervisor. **NLRB v. Kentucky River Community Care**, 532 U.S. 706 (2001).

The Board has long held that the title “supervisor” is not dispositive of supervisory status. **Waterbed World**, 286 NLRB 426 (1987). Therefore, the fact that the Employer may have designated Evans as an hourly “supervisor” or “manager” is of no consequence, absent a showing that she possesses and exercises one or more of the indicia set forth in Section 2(11).

Findings of fact and conclusions

Based on the above-cited authority, the entire record herein, and for the reasons detailed below, I find that the Employer has failed to meet its burden of establishing that Anita Evans is a statutory supervisor, and I shall include her in the unit found

appropriate for bargaining. The record establishes that Evans primarily performs sales associate work, rather than supervisory tasks. Specifically, the store manager testified that Evans spends 85-90 percent of her time stocking the sales floor and changing out features and end caps. While she has additional duties, including placing product orders, picking up go-backs from the customer service desk, taking damaged or recalled items to claims, and checking competitors' prices, none of these relate to supervisory functions described in Section 2(11) of the Act.

The Employer asserts that Evans is a statutory supervisor because she: 1) participates in hiring, firing, and promotion decisions; 2) independently directs the work of TLE employees; 3) conducts performance appraisals; 4) adjusts employee grievances and approves employee time off; 5) documents employee training progress; and 6) is paid substantially more than employees she supervises. I find that these last two assertions relate to secondary supervisory indicia and do not warrant further discussion, since it is well settled that secondary indicia of supervisory status cannot transform an individual into a statutory supervisor if the individual does not possess any of the powers enumerated in Section 2(11). **Central Plumbing Specialties, Inc.**, 337 NLRB 973, 975 (2002); **Beverly Enterprises--Ohio, d/b/a Northcrest Nursing Home**, 313 NLRB 491, 508,509 (1993). I shall address the remaining assertions immediately below.

1) Evans participates in hiring, firing and promotion decisions:

There is no record evidence that Evans has the independent authority to hire, fire, discipline, or promote employees. I find the Employer's contention that Evans has hiring authority because she participates in the interview process and that the Employer

has purportedly followed her “recommendations” to promote one employee and hire another to be unavailing. While Evans does participate in the early stages of the interview process in conjunction with an acknowledged member of management, follow up interviews must be conducted by a salaried manager and actual effective hiring recommendations come from that manager, not Evans. Further, ultimate authority for hiring rests solely with the store manager. Moreover, there is no record evidence that Evans has ever rejected an applicant from further consideration at the initial stage of the hiring process using her independent judgment.

With regard to Evan’s purported promotion and hiring recommendations, Evans testified only that she knew an employee who was interested in the service manager position and that she had relayed that information to Michael Jordan, TLE assistant manager at the time, and to the TLE district manager. With regard to a second circumstance, Evans testified only that she recommended a particular applicant for hire to Jordan. In both instances Evans’ testimony was conclusory and there was no follow up inquiry into whether the salaried managers acted solely on her recommendations or even that they took her recommendations into consideration when they made the actual hiring decisions. Recommendations regarding personnel action are supervisory only if they are "effective" within the meaning of Section 2(11). The Act does not define the phrase "effectively to recommend", but under the Board's construction of that phrase, "authority effectively to recommend generally means that the recommended action is taken without independent investigation by superiors, not simply that the recommendation is ultimately followed." **Children's Farm Home**, 324 NLRB 61 (1997).

With regard to disciplining and firing employees, Evans testified that she does not know what authority she has and that if disciplinary matters come up, she usually consults with Assistant Manager Madeen. The record fails to establish how often this has occurred and what happens when she consults with Madeen. There is no evidence that she has, in fact, ever disciplined anyone. Moreover, the fact that Evans may report incidents regarding other employees or rule infractions to upper management is not indicative of supervisory status. Such a reportorial function does not constitute supervisory authority. In **Williamette Industries, Inc.**, 336 NLRB 743 (2001), the Board stated: “Where oral and written warnings simply bring to an employer’s attention substandard performance by employees without recommendations for future discipline, the role of those delivering the warnings is nothing more than a reporting function, which is not supervisory authority. [Citations omitted.]” See also, **Panaro & Grimes**, supra at 812; **Ryder Truck Rental, Inc.**, 326 NLRB 1386 (1998).

With regard to firing of employees, the Employer relies on some exit interview forms signed by Evans on which a box was checked either recommending the employee for rehire or not. These forms, like the employee appraisal forms discussed below, must be signed by a salaried manager and the store manager. Evans signed these forms and testified that Jordan had asked her opinion about whether these employees should be considered eligible for rehire. Evans did not actually fill out the exit interview forms and the record fails to establish what other input Jordan sought in making his final recommendation about eligibility for rehire. Finally, the record is undisputed that ultimate authority in hiring, firing and disciplinary matters rests with the

store manager. In fact, store manager Murray specifically testified that even salaried assistant managers need his approval before they mete out any discipline.

2) Evans independently directs the work of TLE employees:

The Employer asserts that Evans is a statutory supervisor because she uses independent judgment in directing Department 10 employees to perform tasks and because she fills in for assistant manager Madeen on his scheduled day off each week. I conclude that the Employer has failed to establish that Evans uses independent judgment in directing the work of Department 10 employees. Regarding the direction and assignment of work, the record shows that Evans meets with Madeen in the morning, and together they determine and prepare a list of what tasks need to be done that day. Evans actually performs most of the tasks herself. Evans testified that if she needs help and two additional Department 10 employees are working at that time, she asks them to decide which employee will assist her and which one will work the sales counter. Evans was not asked what she does if the employees cannot agree on where each will work. In any event, the Employer has failed to establish that Evans directs the sales associates in a manner that is not merely routine or perfunctory in nature or based on her experience. In **SDI Operating Partners**, 321 NLRB 111 (1996), the Board held that that an individual's responsibility for planning and scheduling field operations, assigning work to others at those operations, and directing others to perform various discrete tasks at those operations, did not render the responsible individual a supervisor, as those responsibilities were carried out based upon the individual's experience and expertise, and did not involve "real managerial discretion that would

require the exercise of independent judgment.” Similarly, in **KGW-TV**, supra, the Board stated:

In applying the indicia of assignment and responsible direction in this case, however, the Board must distinguish between the exercise of independent judgment and the giving of routine instructions, and between the appearance of supervision and supervision in fact. Thus, it is well established that merely having the authority to assign work does not establish statutory supervisory authority. Further, not every act of assignment constitutes statutory supervisory authority. As with every supervisory indicia, assignment must be done with independent judgment before it is considered to be supervisory under Section 2(11). Similarly, even the exercise of substantial and significant judgment by employees in instructing other employees based on their own training, experience, and expertise does not translate into supervisory authority responsibly to direct other employees. [Citations omitted.]

In the matter herein, it appears that Evans directs the sales associates and night stocker employees based on the list she formulates with Madeen and based on familiarity with the work to be accomplished. There is no record evidence that failure to follow the lists can result in discipline. Finally, the Board has found that routine direction of simple tasks or the issuance of “low-level orders” does not constitute supervisory authority. **Williamette Industries**, supra.

With regard to the Employer's assertion that Evans fills in for Madeen on Wednesdays, the record is silent as to what duties Evans performs when she is “filling in.” It is well settled that isolated substitution for a statutory supervisor does not warrant a finding of supervisory status. Where intermittent supervision of unit employees occurs, the test is whether the part-time supervisor spent a “regular and substantial” portion of her time performing supervisory duties. **Carlisle Engineered Products, Inc.**, 330 NLRB 1359 (2000), citing **Latas de Alumino Reynolds**, 276 NLRB 1313 (1985). The Employer has failed to establish what Evans does when filling in for Madeen that is

different from her normal daily tasks and what her authority is when doing so. Thus, I conclude that the record evidence is insufficient to sustain the Employer's burden of demonstrating that Evans is a statutory supervisor on this basis.

3) Evans conducts performance appraisals:

The Employer contends that Evans has a meaningful role in the administration of Department 10 performance appraisals, which correlates to increases in employee pay. For the reasons discussed below, I reject the Employer's contention that the Evans' role in evaluating employees makes her a statutory supervisor. The Board has held that an individual's role in evaluating coworkers is not supervisory unless those evaluations "lead directly to personnel actions affecting those employees, such as merit raises."

Ten Broeck Commons, 320 NLRB 806, 813 (1996).

The appraisals in which Evans was involved were 90-day appraisals, and the record fails to establish that employees receive pay raises associated with 90-day appraisals. Rather, the record establishes that employees receive pay raises based on their annual evaluations or if they are recommended for merit raises by salaried managers. Moreover, even the store manager cannot authorize merit raises, but must have them authorized by his district manager.

While the Employer relies on the Board's finding of supervisory status for a sporting goods department manager on this basis in **Wal-Mart Stores, Inc.**, 335 NLRB 1310 (2001), the Board specifically found in that case that the district manager, "testified that each assistant store manager 'is going to be different on how they specifically handle' the evaluation process with department managers." The Board then stated, "Accordingly, our finding as to Spearman's supervisory status is limited to his authority,

to, at the least, effectively recommend pay raises in connection with the appraisal process at the Lubbock store.” I find the facts and supervisory findings in **Wal-Mart Stores, Inc.**, 340 NLRB No. 31 (2003), to be more applicable to the case now at issue. Specifically, the Employer had contended that 22 department managers in Store 1609, Grand Rapids, Michigan were statutory supervisors, in part, because of their involvement in the annual employee appraisal process resulting in percentage wage increases for employees being appraised.¹⁰ The Board found the evidence relating to performance appraisals did not support a finding that four department managers under discussion were statutory supervisors based on the fact that assistant managers were often present during the associates’ yearly performance discussion, signed the final evaluations, and had ultimate responsibility for their completion.¹¹ Based on the foregoing, I find that the Employer in the instant matter has failed to establish that Evans has participated in the annual performance appraisal process or that her involvement in 90-day appraisal process is directly linked to pay increases for Department 10 employees.

4) Evans adjusts employee grievances and grants time off:

The Employer contends that Evans is statutory supervisor because she has resolved employee grievances relating to scheduling issues and has authority to grant employee time off. At the outset, I note that there is no record evidence to support a conclusion that employees have gone to Evans with “grievances” about time off.

Evans testified that if employees come to her to request schedule changes, she refers

¹⁰ The store manager herein testified that the Employer no longer uses the percentage increases applicable at the time of the Board's decision in **Wal-Mart**, id. Instead, the Employer has implemented the flat-rate increase amounts of 55 cents and 40 cents per hour.

¹¹ The Board did not analyze the supervisory status of the other 16 alleged supervisors because it determined that to do so would not materially affect the Order. Id., fn 15.

them to Madeen if he is available. If Madeen is not available, she reviews the schedule to see if there is adequate coverage so the employee can have the time off. Evans did not specify what she does if she determines there is not adequate coverage for the employee to have the time off or how often she has even handled such a request, rather than referring the employee to the assistant manager. Moreover, it is clear that Evans does not have the authority to authorize overtime to cover another employee's time off, as such authority rests solely with the store manager. Thus, the Employer has not presented sufficient evidence to show that any involvement by Evans in resolving employee time off requests is supervisory in nature.

Similarly, there is an absence of record evidence to warrant a determination that Evans exercises independent judgment with respect to granting employees time off from work as asserted by the Employer. The evidence establishes that employees generally ask for the salaried manager in charge of the store if they call in sick or with an emergency requiring time off. There is no evidence that employees call Evans with such requests. Similarly, if an employee clocks in at a time other than his/her scheduled start time, a salaried manager must key them into the computer timeclock system. Evans does not have such authority. Finally, the fact that Evans signs time adjustment forms does not establish supervisory authority because the record shows that these forms are generally used after the time off has already occurred and Evans' testimony does not demonstrate that she uses any independent judgment in signing these forms. Rather, she signs them as a matter of routine. See e.g., **JC Brock Corp.**, 314 NLRB 157 (1994); **Chevron Shipping Company**, 317 NLRB 381 (1995).

Based on the forgoing, I conclude that the record evidence is insufficient to sustain the Employer's burden of demonstrating that Anita Evans is a statutory supervisor. I shall, therefore, include her in the unit.

B. Unit Determination

Unit determination legal framework

The Petitioner seeks a unit limited to the TLE Division 6 employees. The Employer contends that a unit limited to TLE Division 6 is not appropriate based on the evidence presented herein and that the only appropriate unit is a wall-to-wall unit. As noted by the Employer, the four prior Regional Director's decision finding units of TLE Division 6 TLE service and automotive sales employees to constitute appropriate units are not controlling on my decision herein. Nonetheless, I find the analysis and legal authority cited in those decisions instructive. Moreover, those decisions were based on the Board's finding of an appropriate unit limited to employees in the automotive services department in **Sears, Roebuck and Co.**, 261 NLRB 245 (1982). I note also that the Board has not reviewed a case addressing the appropriateness of automotive services units in retail stores since the **Sears** case in 1982.

As the Petitioner correctly asserts, the Board has long held that a unit need not be the only appropriate or even most appropriate unit, but merely an appropriate unit.

Overnite Transportation Co., 322 NLRB 723 (1996); **Dezcon, Inc.**, 295 NLRB 109 (1989). In **Overnite**, the Board stated:

The Board's procedure for determining an appropriate unit under Section 9(b) is to examine first the petitioned-for unit. If that unit is appropriate, then the inquiry into the appropriate unit ends. If the petitioned-for unit is not appropriate, the Board may examine the alternative units suggested by the parties and also has discretion to select an appropriate unit that is different from the alternative proposals of the parties. [Citations omitted.]

Similarly, the Board in **Sears**, supra 261 NLRB 245, at 246, stated, “Thus, the sole inquiry here is whether a unit consisting of employees of the auto center is appropriate in the circumstances of this case. To this determination, it is irrelevant whether another unit would also be appropriate, more appropriate, or most appropriate.”

The Board in **Sears**, weighed standard community of interest factors in its analysis in making that unit determination.¹² With regard to community of interest, the Board looks at various factors to determine whether a group of employees constitutes an appropriate bargaining unit. Among the factors considered are compensation, work hours, common supervision, job qualifications and skills, work contact, interchange of employees, functional integration, and bargaining history. See, **John Scripps Newspaper Corp. d/b/a The Sun**, 329 NLRB 854 (1999), (citing **Kalamazoo Paper Box Corp.**, 136 NLRB 134, 137 (1962)).

The Board in **Sears**, supra, determined that the “auto center employees have limited contact with the other store employees, and constitute a functionally integrated group working in a recognized product line under separate supervision who share a community of interest that sufficiently differentiates them from the other store employees and functions as to require the conclusion that they constitute an appropriate unit.” Id, at 247. The Board also emphasized the auto center’s separate line of

¹² I find the cases relied on by the Employer inapposite to the analysis herein. In this regard, the Employer places significant reliance on **Ray’s Sentry**, 319 NLRB 724 (1995), which involved a bakery department in the grocery store industry. That case was decided in the same year as **Scolari’s Warehouse Markets**, 319 NLRB 153 (1995), involving a meat department also within a retail grocery store. Those cases turn on whether separate bakery and meat department units were still appropriate in light of the fact that the retail grocery industry was moving away from scratch baking and traditional meatcutting to bakeoff products and pre-cut boxed meats. Thus, the analysis depended on whether the bakers or meatcutters still possessed a high degree of skill setting them apart from other store employees. The Board has not applied that test to automotive service employees, but instead has applied traditional community of interest analysis in finding separate automotive units appropriate.

supervision, separate and readily identifiable work area, and the employer's administrative divisional structure. Finally, the Board noted in **Sears** that, "the employees in the auto center are greatly dependent upon one another for the continued operation of the center itself and for their individual livelihoods. Indeed, unlike the obvious interdependency of the auto center employees, the record reveals the absence of any close relationship between the work of the requested employees and any other group of employees in the retail store."

Findings of fact and conclusions

I turn now to analyzing this case based on the community of interest factors annunciated above. With regard to those factors I note that there is no dispute that the wages, work hours, benefits, and employment policies are similar for all store employees, including those sought by the Petitioner. Accordingly, these factors weigh in favor of the Employer's position. I further note that there is no bargaining history among any of the store employees, so this factor has no bearing on my unit determination.

With regard to common supervision, the TLE Division 6 employees report to assistant manger Madeen, who in turn reports to the store manager for personnel matters and to the TLE district manager for merchandising-related matters. Accordingly, I find that this factor weighs in favor of the petitioned-for unit. In this regard, I note that, while other assistant managers assist employees in TLE Division 6 with customer service matters such as cash register problems or customer complaints if they are more readily than Madeen, there is no evidence that they are involved in day-to-day supervision of employees. Similarly, interviewing, scheduling, and performance

appraisals are conducted by TLE assistant manager Madeen. Finally, there is no evidence that Madeen divides his time between his duties in TLE Division 6 and other areas of the store. Thus, his supervisory duties relate exclusively to TLE and automotive sales.

With regard to job qualifications and skills and temporary employee interchange, I find that these factors also favor a finding that the petitioned-for unit is appropriate. In reaching this conclusion, I am mindful that the TLE service technicians are not highly skilled mechanics, rendering them craft or technical employees. Nonetheless, service technicians do have specialized training in their job functions, and they must be certified by the Employer before they are allowed to work on customer vehicles unsupervised. Because of the certification requirement imposed by the Employer upon itself, employees from other departments in the store are not moved to assist in TLE if extra help is needed. Instead, the Employer utilizes automotive sales employees who possess the required certification, seeks off duty technicians willing to work overtime, borrows TLE employees from other stores, or works shorthanded. While these same work certification restrictions do not apply in the case of the automotive sales associates, the record establishes that if Department 10 is short handed, that department also does not look elsewhere in the store, but uses the service technicians, TLE support manager or TLE service manager to fill in.¹³

¹³ The Employer did elicit testimony of occasional instances where sporting goods department employees cut keys for customers or stockers from other departments assisted the automotive sales night stockers, but these instances were at most minimal and in some cases based on employees voluntarily helping out. I find that employees volunteering to assist employees in another department on an irregular basis for very brief periods of time to perform discrete tasks is not a significant factor in the community of interest analysis. See e.g., **D&L Transportation, Inc.**, 324 NLRB 160, fn 7 (1997), in which the Board noted that voluntary interchange is of less significance in unit determinations. Moreover, the cutting of

With regard to permanent transfers, the record reflects that about ten employees have permanently transferred into and out of TLE Division 6 in the past two years. However, permanent transfers of employees are a minor consideration in any community of interest analysis. In **Overnite Transportation Company**, 331 NLRB 662 (2000), the Board stated that where, as herein, permanent transfers are voluntary, they are accorded less weight in unit determinations. See also, **J&L Plate, Inc.**, 310 NLRB 429 (1993), where the Board stated: "There were also 21 permanent transfers of unit employees in the same period, which is both an insubstantial number and of less weight than evidence regarding temporary transfers." The issue in **J&L Plate** involved community of interest analysis regarding the scope of the unit for a two-plant operation. The 21 permanent transfers discussed by the Board related to a possible combined unit of 172-182 employees. See also, **Red Lobster, Inc.**, 300 NLRB 908 (1990). As discussed above, the absence of temporary employee transfers and interchange is a far more important consideration in the community of interest analysis.

With regard to work contact, I also find that this factor favors a finding that the petitioned-for unit is appropriate. In this regard, I find that like **Sears**, *supra*, while the employees in TLE Division 6 have work contact with other store employees, they have significantly greater work contacts and interdependence on each other based on their common functions of selling automotive products and related services to customers. Thus, TLE service employees assist in the automotive sales area as needed and often

keys is a relatively insignificant portion of the work performed in TLE Division 6 and not representative of the type of work that defines the automotive character of the division.

interact with the same customers and each other regarding automotive products needed by the service personnel.

Finally, while the Employer asserts that the store is a functionally integrated operation rendering a unit limited to TLE Division 6 inappropriate, I conclude that any functional integration is outweighed by the fact that the automotive sales and TLE service areas are a distinct area of the store, noted by an outside sign, separate entrance and parking lot and customer waiting area.

There are approximately 20 employees in the unit.

DIRECTION OF ELECTION

An election by secret ballot shall be conducted by the undersigned among the employees in the unit found appropriate at the time and place set forth in the Notice of Election to issue subsequently, subject to the Board's Rules and Regulations.¹⁴ Eligible to vote are those in the unit who are employed by the Employer during the payroll period ending immediately preceding the date of this Decision and Direction of Election, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Those eligible to vote also include those who regularly average four hours per week for the last quarter prior to the eligibility date. Employees engaged in any economic strike, who have maintained their status as strikers and who have not been permanently replaced are also eligible to vote. In addition, in an economic strike, which commenced less than 12 months before the election date,

¹⁴ Your attention is directed to Section 103.20 of the Board's Rules and Regulations. Section 103.20 provides that the Employer must post the Board's Notice of Election at least three full working days before the election, excluding Saturdays and Sundays, and that its failure to do so shall be grounds for setting aside the election whenever proper and timely objections are filed.

employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements, are eligible to vote. Those in the military services of the United States Government may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether they desire to be represented for collective bargaining purposes by:

**UNITED FOOD AND COMMERCIAL WORKERS UNION,
LOCAL NO. 7**

LIST OF VOTERS

In order to ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties in the election should have access to a list of voters and their addresses, which may be used to communicate with them. *Excelsior Underwear Inc.*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759 (1969); *North Macon Health Care Facility*, 315 NLRB 359 (1994). Accordingly, it is hereby directed that within seven (7) days from the date of this Decision, two (2) copies of an election eligibility list containing the full names and addresses of all the eligible voters shall be filed by the Employer with the undersigned, who shall make the list available to all parties to the election. In order to be timely filed, such list must be received in the Regional Office, National Labor Relations Board, 700

North Tower, Dominion Plaza, 600 Seventeenth Street, Denver, Colorado 80202-5433, on or before **February 4, 2005**. No extension of time to file this list shall be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the requirement here imposed.

RIGHT TO REQUEST REVIEW

Under the provision of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision and Direction of Election may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, NW, Washington, DC 20570. This request must be received by the Board in Washington by **February 11, 2005**. In accordance with Section 102.67 of the Board's Rules and Regulations, as amended, all parties are specifically advised that the Regional Director will conduct the election when scheduled, even if a request for review is filed, unless the Board expressly directs otherwise.

Dated at Denver, Colorado, this 28th day of January, 2005

/s/ B. Allan Benson

B. Allan Benson, Regional Director
National Labor Relations Board
Region 27
700 North Tower, Dominion Plaza
600 Seventeenth Street
Denver, Colorado 80202-5433